

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
Nondiscrimination in the Distribution of)	
Interactive Television Services Over Cable)	CS Docket No. 01-7
)	
)	

REPLY COMMENTS OF AT&T CORP.

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SUMMARY

The initial comments confirm that regulation of interactive television (“ITV”) is unwarranted. Therefore, the Commission should close this Notice of Inquiry without proposing regulations for the industry. In these reply comments AT&T focuses on the following points:

- Commenters agree that the ITV market is only beginning to emerge. Even commenters advocating that the Commission regulate ITV concede that the ITV market is nascent. In this environment, regulation of ITV would be premature and would harm consumers, innovation, and investment. Indeed, the only economic evidence submitted by any party in this proceeding fully supports this view.
- Commenters submitted substantial evidence that a large and diverse range of companies are entering the ITV market. Of particular relevance, competition from ITV distributors other than cable operators continues to grow. It is clear that there are no barriers to entry that would justify regulation of ITV.
- Commenters advocating regulation did not present any evidence that cable companies are engaging in anticompetitive conduct. Rather, they rely on *speculation* about what might happen in the ITV market. However, the courts have said that speculation will *not* support the imposition of regulation, especially far-reaching, common carrier-type regulation, in light of cable operators’ well-established First Amendment rights.
- Commenters advocating regulation suggest a variety of jurisdictional bases for ITV regulation; however, each relies on an interpretation of the Communications Act that is unsustainable and fails to comport with prior Commission precedent. ITV services are cable services subject to regulation under Title VI. Sections 621(c) and 624(f) of Title VI prohibit the imposition of common carrier-like regulations (such as nondiscriminatory access requirements) on a cable operator’s provision of cable services. No commenter advocating ITV regulation explained how their suggested bases for Commission authority to regulate escape the statutory limits in sections 621(c) and 624(f). Alternatively, ITV services are information services, which also are not subject to common carrier-type regulation. However, in no event are ITV services provided by cable operators telecommunications services.
- The Commission should reject the attempts of some commenters to use this proceeding to pursue their agenda on the retail sale of set-top boxes. The retail sale rules already address any concerns about potential discrimination against unaffiliated ITV services. Moreover, the most successful ITV services to date, *e.g.*, WebTV, AOLTV, and TiVo, are offered through a set-top box that is not provided by, or controlled by, the cable operator.

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AT&T Corp. (“AT&T”) respectfully submits the following reply comments in the above-captioned proceeding.¹

I. REGULATION OF ITV IS UNNECESSARY AND WOULD BE HARMFUL, PARTICULARLY SINCE, AS ALL COMMENTERS AGREE, ITV IS A NASCENT BUSINESS WITH NUMEROUS COMPETITORS AND LOW BARRIERS TO ENTRY.

Both proponents and opponents of regulation of interactive television (“ITV”) agree that the ITV business is nascent. In addition, parties submitted evidence showing that barriers to entry into the ITV business are low and that numerous competitors are providing a variety of services from content to software to distribution. Public policy, economic theory, and the Commission’s own precedent argue against regulation under such circumstances.

¹ *In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, Notice of Inquiry, CS Docket. No. 01-7, FCC 01-15 (rel. Jan. 18, 2001) (“*Notice*”).

A. Commenters Agree that the ITV Business Is Nascent.

AT&T, other cable operators, and entities unaffiliated with cable operators all agree that ITV is in the early stages of its development.² Even advocates of ITV regulation concede that the ITV business is “nascent,” “emerging,” “fluid and dynamic,” “a new and evolving technology,” and in its “early stages.”³ Indeed, it is clear from the varied and inconsistent

² See Comments of AT&T at 1-19; Comments of AOL Time Warner at 3-8, 16-18; Comments of Cablevision at 5-15; Comments of Charter at 2-4; Comments of Comcast at 18-19; Comments of NCTA at 7-14. See also Comments of Canal+ Technologies at 25 (“ITV is in the early stages of development, and a wide variety of providers have entered the marketplace to stimulate competition and innovation.”); Comments of DirecTV at 2 (“ITV services and technologies are still evolving to find or create markets for ITV services.”); Comments of NFL at 2 (“At this point, because the ITV market is, at most, nascent, it would be premature for the Commission to determine that the best way to foster its growth is through regulation.”); Comments of OpenTV *passim* (highlighting the effects of premature regulation and urging the Commission to “refrain from regulating unless harms to consumers are evident, and unless regulation can prevent those harms from occurring”); Comments of PBS at ii (describing ITV as being in the “early stage of development” and stating that “it would be premature to provide the Commission with specific policy recommendations at this point”); Comments of Progress & Freedom Foundation at 6 (stating that, in light of the fact that “ITV services themselves are in their infancy still sprouting new acronyms, the Commission would be wise to terminate this inquiry”); Comments of Scripps Networks at 1 (noting that “the ITV market is still in its formative stages and in a state of such rapid change that it is difficult to even define what constitutes ITV”).

³ Comments of Consumers Union at 2, 4, 6, 11 (describing the ITV industry as “at the formation,” “nascent,” “at the outset,” and “emerging,” and stating that “no one can accurately predict how ITV will develop”); Comments of Gemstar-TV Guide at 2, 6 (characterizing the ITV market as “fluid and dynamic” and noting that it is “unclear at this time precisely what steps the Commission will need to take”); Comments of ALTV at 3 (stating that “ITV is still a new and evolving technology and as such requires major capital investments, and entails substantial financial risks”); Comments of MSTV at ii, 1-2 (describing ITV services as “nascent” and ITV as “an important *new* communications tool” (emphasis added)); Comments of Disney/Viacom *et al.* at 3 (noting that the “*early* stages of ITV are already here” (emphasis added)).

definitions of ITV offered by commenters that there is not even a common understanding of what services will eventually constitute the ITV business.⁴

B. Competition Continues to Grow Among Companies Seeking to Provide ITV Services.

The record amply demonstrates that there is a growing and diverse range of companies providing ITV services.⁵ Even in the brief time since these comments were filed, numerous ITV-related ventures have been launched. For example:

⁴ Compare Comments of EarthLink at 4 (proposing that ITV service be narrowly defined as a “service that supports subscriber-initiated choices or actions, *involving the transmission or manipulation of information controlled by the user*, that are related to one or more video programming streams” (emphasis in original)), Comments of TiVo at 3 (arguing that only certain PVR services qualify as ITV services), Comments of DirecTV at 3-4 (arguing that *no* PVR services qualify as ITV services), *and* Comments of OpenTV at 18-20 (arguing that the Commission’s definition of ITV services does not usefully and clearly divide ITV from other digital communications and imposes legacy distinctions on ITV services that may have unwarranted effects), *with* Comments of Canal+ Technologies at 8 (urging a broad definition of ITV services to include EPGs and PVRs), Comments of Gemstar-TV Guide at 2 (advocating a broad definition of ITV services), Comments of NAB at 21-24 (urging that the definition of ITV services should include EPGs and other services that do not require a return path), *and* Comments of Disney/Viacom *et al.* at 2-3 (defining ITV services “to include all services that transmit, to or from the viewer’s television, viewer-preferred content or data that is directly or indirectly associated with the main audio or video signals”).

⁵ See Comments of AT&T at 8-23 (citing *Broadcasting & Cable*’s list of ITV companies, ATVEF’s directory highlighting that over 140 companies have signed licenses to implement ATVEF content specifications, and numerous press accounts and analyst reports detailing the significant entry of companies providing ITV content, software, and distribution); Comments of Cablevision at 15-18 (showing that ITV services will be available from a variety of companies (DirecTV, Microsoft, EchoStar, Motorola, Blockbuster, Enron, Alcatel, Oracle, Wave Express, Disney, Sony) over a variety of platforms (satellite, cable, broadcasting, DSL, PC)); Comments of NCTA at 9-14 (describing various ITV services that have been developed and are being deployed incrementally by various companies (interactive program guides by Gemstar/TV Guide and WorldGate; personal video recorders by TiVo, Replay, DirecTV, and EchoStar; video on demand by DIVA, AT&T, Comcast, Cox, AOL Time Warner, Charter, and Insight; enhanced TV services by Wink, Respond TV, and Commerce.TV; internet access by WebTV and AOLTV; and local content by Source Media)); Comments of Golf Channel *et al.* at 15-16 (noting that
(footnote continued...))

- Wink has signed numerous agreements in the last few months, including deals with: (1) Bloomberg and DirecTV; (2) Gemstar-TV Guide; (3) Turner Broadcasting; (4) Comcast; (5) Matsushita; (6) Beyond Z Interactive Media; (7) NBC; and (8) E*Trade.⁶
- OpenTV recently announced that its ITV software is now deployed in over one million of EchoStar's Dish Network receivers.⁷
- Videolocity Int'l Inc. announced a video on demand ("VOD") distribution contract with G.W.B. Inc.⁸
- Commerce.TV, a privately held company whose primary investors include OpenTV, Insight Communications, Motorola, Citigroup, and Adelphia, selected unaffiliated REZN8 to design and produce graphical elements for two ITV applications called TV Select and TV Mall.⁹

(...footnote continued)

"there are already numerous companies operating within the [ITV] industry" and listing various examples). *See also* Comments of Canal+ Technologies at 26 (noting that a "broad array of companies are entering the ITV industry thus stimulating competition, innovation and growth").

⁶ *See generally Wink Television Press Room* (last visited Apr. 26, 2001) (listing Wink's press releases), <http://www.wink.com/contents/PressReleases.shtml> - 1999. On March 28, 2001, Wink announced that its enhanced television service now reaches more than three million households thanks to "[g]rowth with DirecTV, coupled with steady deployments into additional digital cable systems owned by Adelphia, AT&T, Charter Communications, Comcast and Time Warner cable." Press Release, Wink, Inc., *Wink Enhanced Television Reaches More than Three Million Households* (Mar. 28, 2001), <http://www.wink.com/contents/PressReleases/985907842/content.shtml>.

⁷ *See* Press Release, OpenTV, *OpenTV Reaches Milestone in U.S. Interactive Television Market* (Apr. 5, 2001), <http://www.opentv.com/news/2001/040501a.html>.

⁸ *Videolocity Int'l Inc. Announces Video-On-Demand Distributor Contract*, xDSL.com News Releases (Apr. 19, 2001), <http://www.xdsl.com/newsreleases/printfriendly.asp?newsid=156020>.

⁹ *REZN8 to Deliver Graphical User Interface and Navigation Package for Commerce.TV; Design and Communication Company Breaks Ground with ITV Project*, Business Wire (Apr. 24, 2001), at <http://www.businesswire.com/>.

- MetaTV, which had previously announced that it was working with Pegasus Communications to develop the first ever TV portal for satellite subscribers,¹⁰ received a \$28 million dollar investment from a variety of strategic investors that includes Comcast, Cox, and Liberate Technologies.¹¹
- Grande Communications announced an agreement with Liberate to use Liberate's software throughout its franchises in twenty-five Texas cities.¹²
- Motorola made an investment in Gotuit Media Inc. and agreed to incorporate Gotuit's personal video recording ("PVR") software in the DCT-5000. Similarly, Scientific-Atlanta Inc. signed a licensing deal with Metabyte Networks Inc. to incorporate Metabyte's PVR software in S-A's Explorer 8000.¹³
- Charter Communications selected Liberate Technologies' software for the rollout of ITV services and previously had entered into agreements with Wink for its interactive programming and Diva Systems for its VOD services.¹⁴

These deals provide further evidence that barriers to entry are low and competition in ITV services is increasing rapidly.

¹⁰ See Press Release, MetaTV, *Pegasus and MetaTV Will Develop First Ever Interactive TV Portal for Satellite Subscribers* (Aug. 9, 2001), <http://www.metatv.com/news/new/press080900.htm>.

¹¹ See Press Release, MetaTV, *MetaTV Receives \$28 Million Investment from Comcast, Cox and Other Strategic Investors* (Apr. 23, 2001), <http://www.metatv.com/news/new/04200128mil.htm>.

¹² See Press Release, Liberate Technologies, *Grande Communications Launches Interactive Services on Liberate TV Platform Software for Basic Digital Set-Tops* (Apr. 18, 2001), http://press.liberate.com/archives/2001/041801_grande.html.

¹³ See Adi Kishore, The Yankee Group, *Digital Video Recorders: The Revolution Remains on Pause*, Media & Entertainment Strategies, Apr. 2001, at 5.

¹⁴ See Press Release, Charter Communications, *Charter Communications Selects Liberate Software in Deployment of Interactive Cable Television Services* (Mar. 29, 2001), http://www.chartercom.com/about_charter/press.asp?pr=78.

C. The Record Also Demonstrates that Competition Continues to Grow Among Companies Seeking to Provide *Distribution* of ITV Services.

AT&T and other commenters submitted evidence that numerous companies are distributing ITV services using a variety of non-cable platforms, including satellite, DSL, broadcasting, wireless, a combined PC-TV approach, and other facilities.¹⁵ And, even cable's competitors acknowledge the viability of alternative ITV distribution platforms.¹⁶ Moreover, OpenTV and Canal+ Technologies, two of the leading ITV software companies, explain that they have developed ITV products for alternative distribution platforms that have enjoyed widespread success in the European ITV market.¹⁷ OpenTV notes that "consumers are currently

¹⁵ See Comments of AT&T at 11-23; Comments of NCTA at 20-24 (providing examples of ITV services being provided by DBS, DSL, broadcasters, and companies such as Microsoft); Comments of Golf Channel *et al.* at 10-13 (discussing DBS and DSL providers' ITV efforts). See also Comments of Canal+ Technologies at 14-20 (describing distribution of ITV services by "cable, satellite and terrestrial systems").

¹⁶ See Comments of DirecTV at 1 (referring to ITV as "an emerging suite of services offered or soon to be offered by cable operators *and other Multichannel Video Programming Distributors*" (emphasis added)); Comments of SBC/BellSouth at 8 (acknowledging that "alternative platforms – DSL, fixed wireless, and satellite – may provide enough actual and potential competition to limit cable's market power, and to remove any basis for regulating the cable platform on a common-carrier basis" (internal quotations omitted)).

¹⁷ See Comments of Canal+ Technologies at 14 (noting that "Canal+ Technologies support a multi-platform distribution approach [that] is fully supported by the experience in Europe where ITV services are being offered over cable, satellite and terrestrial systems"); Comments of OpenTV at 2 ("OpenTV solutions have been selected by 40 digital cable, satellite, and terrestrial communications networks in over 50 countries, including . . . EchoStar's DISH Network and USA Media Group in the United States."). See also Jim Rutenberg & Geraldine Fabrikant, *Dream Prize Draws Closer for Murdoch*, NY Times, May 7, 2001, at C1 (noting that Rupert Murdoch's BSkyB satellite service in Britain was "already offering the sorts of interactive services that are still experiments for American cable companies," and that News Corp. "believed it could offer similar services here in relatively short order with DirecTV [if News Corp. succeeds in buying Hughes/DirecTV] -- especially with the help of Microsoft, which has agreed to be a minority partner in the Hughes deal, kicking in \$3 billion").

finding DBS superior to cable” and that, with respect to having a broadband return path, “Dataquest forecasts that the worldwide number of satellite [broadband] terminals will increase from 293,500 to 7.2 million in 2005.”¹⁸ Similarly, Canal+ Technologies points out that, in Europe, “some thirty or so successful ITV services and applications have been running for almost four years on satellite platforms such as CanalSatellite.”¹⁹

Since the initial comments were submitted, more companies have announced plans to distribute ITV services. For example, in March, Pegasus Communications launched Pegasus Express, a two-way satellite broadband service that will compete with digital cable.²⁰ And, on April 3, 2001, DirecTV’s parent, Hughes Electronics Corp., closed its acquisition of DSL provider Telocity.²¹ With the addition of a DSL option, DirecTV will be able “to compete more directly with cable operators that are aggressively deploying high-speed cable modems and a two-way interactive pipe for digital-cable television.”²²

¹⁸ Comments of OpenTV at 11-12 (citing George A. Chidi, Jr., *Dataquest Says Satellite Broadband Will Surge by 2005*, InfoWorld, Feb. 26, 2001).

¹⁹ Comments of Canal+ Technologies at 20.

²⁰ See “*This Is Only the Bottom of the First*,” BusinessWeek Online, Apr. 17, 2001 (quoting Pegasus Communications’ CEO Mark Pagon as announcing the launch of Pegasus Express, which will “provide a huge opportunity for Pegasus and satellite in general”), http://www.businessweek.com/print/bwdaily/dnflash/apr2001/nf20010417_411.htm?mainwindow.

²¹ See Monica Hogan, *Hughes Closes Telocity Deal*, Multichannel News, Apr. 9, 2001, at 34.

²² *Id.* (also noting that EchoStar is “eyeing a DSL component”); See also Comments of AT&T at 15-16 (detailing DirecTV’s various ITV products and services, including Ultimate TV, a service that combines DirecTV programming with enhanced television functionality from Microsoft).

Similarly, Verizon is now exploring ITV business opportunities “as a way to protect its interests in its core voice and data markets, where digital cable systems have begun to make inroads by packaging advanced video services with telephony.”²³ Verizon has met with the major studios and is reportedly “offering studios upfront sign-up incentive fees in the millions of dollars and [is] even prepared to pass through the entire transaction fee for each movie purchased by the consumer.”²⁴ InfoValue Broadband Streaming also recently announced a partnership with Copper Mountain Networks “to enable broadband providers to deliver on-demand movies and other streaming-video content to customers in multi-tenant unit buildings (MTUs) over existing copper phone wires.”²⁵

To enable these rollouts of DSL-based ITV services, a myriad of companies are developing the necessary equipment and software.²⁶ Moreover, on April 23, 2001, Nortel

²³ Scott Hettrick, *Studios Take the Call for Verizon VOD*, Video Business Online, Apr. 5, 2001, http://www.videobusiness.com/news/040501_verizon_vod.asp.

²⁴ *Id.* (contrasting Verizon offer with the typical agreement between studios and service providers, which provide for transaction fee splits of between 50-50 and 70-30).

²⁵ Press Release, InfoValue Computing, Inc., *Copper Mountain Networks & InfoValue Computing Enable VOD, High-Speed Net Access in Multi-Tenant-Unit Buildings* (Apr. 10, 2001), <http://www.infovalue.com/press.asp?articleID=36>.

²⁶ See, e.g., Press Release, Pace Micro Technology, *Pace Integrates Kasenna MediaBase into Pace's DSL4000* (Apr. 23, 2001) (noting that Pace's integration of Kasenna's technology will enable telephone companies “to deliver high-quality video and interactive services over their existing copper wires”), <http://www.pacemicro.com/newsroom/popupnews.asp?id=100>; Press Release, Minerva Networks, *Motorola and Minerva Networks Form Co-Marketing Alliance to Deliver Powerful IP Television Solutions* (Apr. 23, 2001) (announcing a joint marketing alliance “to accelerate broadband deployments and build networks that enable xDSL service providers to offer advanced television and video services to consumers”), http://www.minervanetworks.com/news/archives/pr-010423_motor.cfm; Press Release, Pace Micro Technology, *Minerva Networks and Pace Partner on IP Television Solutions* (Apr. 23, 2001) (footnote continued...)

Networks, Motorola, Minerva Networks, nCube, Pace, and Phillips announced an alliance “to create a complete end-to-end broadband television solution . . . enabling new revenue opportunities and unsurpassed interactive television solutions over IP networks.”²⁷

In addition, ITV content providers continue to pursue distribution via a personal computer (*i.e.*, the “two-box” method). For example, Richard Glover, executive vice president of Internet media for ABC Inc. and Walt Disney Internet Group, has explained that Disney “see[s] the two-box application as working over all platforms.”²⁸ According to Glover, Disney developed its two-box strategy because the single screen platform remains plagued by technological challenges.²⁹ Just recently, ABC announced that “a record number of 4.5 million visitors came to ABC.com in the month of March . . . due in large part to the Academy Awards, which aired on the ABC Television Network and were cross promoted on ABC.com.”³⁰ In response to this

(...footnote continued)

2001) (announcing an ITV solution for telephone companies “planning to offer video services over their network infrastructures”), <http://www.pacemicro.com/newsroom/popupnews.asp?id=99>.

²⁷ Press Release, Minerva Networks, *Minerva Networks and Partners Form IP Television Alliance to Accelerate the Deployment of Interactive Television Services over Broadband IP Networks* (Apr. 23, 2001), http://www.minervanetworks.com/news/archives/pr-010423_alliance.cfm.

²⁸ Glen Dickson, *Enhanced TV's Platform Pitfalls*, *Broad. & Cable*, Jan. 15, 2001, at 119.

²⁹ *See id.* These are precisely the types of technological uncertainties that argue against regulation of nascent businesses. *See* Comments of AT&T at 4-5.

³⁰ Press Release, ABC, Inc., *Academy Awards, The Drew Carey Show, and New ABC Comedies Contribute to March Success for ABC.com* (Apr. 18, 2001), <http://disney.go.com/pr/abc/releases/20010418.html>. ABC's enhancement of the Academy Awards with interactive content reportedly attracted 461,540 interactive two-box viewers. *ABC's Enhanced TV Oscar's App Attracts 461,540*, *InteractiveTV Today*, Issue 3.52, Mar. 28, 2001, at 8.

surge, Brian Bowman, vice president and general manager of ABC.com, noted that these results “prove that viewers are looking to extend their TV viewing experience with the Internet.”³¹

The evidence showing that alternative platforms are successfully deploying the full range of ITV services refutes NAB’s assertion that distributors other than cable “suffer from a variety of technical drawbacks that make them unsuited to delivering the full range of interactive services.”³² Indeed, in its comments, Canal+ Technologies states that “*based on several years of experience in the deployment of ITV applications and services, [it] believes that significant additional bandwidth is not necessary to deploy ITV services. This conclusion would tend to discard any argument emphasizing the advantage of the cable platform over DBS.*”³³ Similarly, according to DirecTV, “[t]here are as yet no dominant providers of ITV services, and the marketplace is still in the process of sorting out the technological standards that will govern ITV service delivery.”³⁴ Significantly, NAB does not cite a single service which cable operators currently provide that alternative distribution platforms cannot.

³¹ See Press Release, ABC, Inc., *supra* note 30.

³² Comments of NAB at 18.

³³ Comments of Canal+ Technologies at 21 (emphasis added). See also Comments of AT&T at 14-19; Comments of NCTA at 20-21; Comments of Cablevision at 15-16; Comments of Charter at 6.

³⁴ Comments of DirecTV at 2-3.

D. In Nascent Markets with No Apparent Barriers to Entry, It Is Well-Established that Regulation Is Inappropriate and, Indeed, Is Generally Harmful.

The *only* economic evidence in the record supports the continued treatment of ITV as an unregulated business. In particular, AT&T and NCTA demonstrated the harmful effects of government interference in nascent, dynamic, and technologically innovative industries like ITV.³⁵ In contrast, advocates of regulation offered *no* economic analysis to support the view that ITV regulation is necessary.

NCTA submitted two economic analyses that support the conclusion that premature regulation of ITV will harm consumers by skewing business decisions and dampening innovation and investment.³⁶ One analysis, prepared by Professor Schwartz and Dr. John Gale, concluded that “[i]mposing premature regulation of technology choices and business arrangements may therefore foreclose certain technical innovation and variety, raise the costs or degrade the quality of those options that do emerge, and restrict efficient forms of business relationships.”³⁷ The other analysis, prepared by Professor Elhauge, concluded that “[t]he imposition of regulation -- indeed the mere suggestion that regulation might be imposed -- is

³⁵ See, e.g., Comments of AT&T at 33-34 (citing, among other things, the economic analysis conducted by Professors Janusz A. Ordover and Robert D. Willig attached to AT&T Comments, filed in GN Dkt. No. 00-185, app. A (Dec. 1, 2000)); Comments of NCTA at 28-36 & apps. A-B. The Commission has made similar judgments about the risks of regulation in highly-dynamic markets. See Comments of AT&T at 32-33 (noting Commission statements in various proceedings).

³⁶ See generally Comments of NCTA at apps. A-B *passim* (containing an analysis by Professor Einer Elhauge in appendix A (“Elhauge Analysis”), and an analysis by Professor Marius Schwartz and Dr. John Gale in appendix B (“Schwartz/Gale Analysis”)).

³⁷ Schwartz/Gale Analysis at 7.

likely to deter the innovation and investments necessary to create ITV platforms in local markets throughout our land, and to deter the entry necessary [to] make markets for ITV platforms and services competitive.”³⁸

Commenters advocating regulation provide no analysis that contradicts these conclusions about the detrimental effects regulation would have on the nascent ITV industry.

II. REGULATION OF ITV IS PARTICULARLY INAPPROPRIATE GIVEN THE COMPLETE LACK OF EVIDENCE THAT CABLE OPERATORS ARE ENGAGING IN ANTICOMPETITIVE CONDUCT.

A. In the Absence of Anticompetitive Conduct in the Emerging ITV Market, Regulation Is Inappropriate.

Advocates of regulation urge the Commission to intervene in the ITV market to prevent hypothetical future anticompetitive conduct. For example, they warn that cable operators have the “potential” to discriminate, the “willingness” to use anti-competitive means, the “opportunity” to discriminate, and “enormous economic incentives to favor their own or affiliated ITV content and services,” and that cable operators also “could seriously undermine” a competitive ITV market by “attempt[ing] to tie” services together, are “predispos[ed]” to

³⁸ Elhauge Analysis at 7-15, 39 (also providing a detailed analysis explaining the market dynamics for his conclusion). *See also* Bureau of National Affairs, *Powell: FCC Must Be More Responsive, Restrained as Convergence Issues Call*, Communications Alert, Jan. 30, 2001, at 10 (“*BNA Interview*”) (quoting Chairman Powell in response to the question of whether the Commission should be proactive in regulating the nascent IP telephony market: “Part of me generally resists doing that. One I can’t say that I know exactly how it would develop or not. And I think that you always want to give innovation a little bit of a running start. I have this basic[] philosophy: let them build it first. Let’s at least get it to consumers before we start deciding.”).

favoring affiliated service and content providers, and “are moving quickly to build discriminatory features.”³⁹

Absent from the record is any *evidence* of anticompetitive conduct on the part of cable operators. The only ITV-related conduct advocates of regulation cite as anticompetitive is Time Warner’s decision not to carry Gemstar-TV Guide’s electronic programming guide (“EPG”) data embedded in the VBI of a broadcast channel. Gemstar-TV Guide filed a complaint alleging that Time Warner’s decision violated various Commission rules.⁴⁰ However, since the comments were submitted, Gemstar-TV Guide withdrew the complaint on the grounds that no cable operator was currently stripping its guide.⁴¹

³⁹ Comments of MSTV at 4 (“potential”); Comments of Gemstar-TV Guide at 1 (“willingness”); Comments of ALTV at 11 (“opportunity”); Comments of Disney/Viacom *et al.* at 11 (“enormous economic incentives”); Comments of EarthLink at 1 (“could seriously undermine” and “could attempt”); Comments of NAB at 16 (“predisposition of cable operators to favor affiliated service and content providers”); Comments of Consumers Union at 6 (“moving quickly to build discriminatory features”). *See also* Comments of EarthLink at 19 (advocating ITV regulations to “address[] potential issues of discrimination that may arise in the context of interactive television services”); Comments of TiVo at 3-4 (advocating a nondiscrimination regulation based on “the ability of MVPDs to block triggers” and their “gatekeeping position”).

⁴⁰ *See In re Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission’s Must-Carry Rules*, CSR 5528-Z (Mar. 16, 2000).

⁴¹ *See* Ted Hearn, *Time Warner Presses Case in VBI Fight*, Multichannel News, Apr. 16, 2001, at 1. Moreover, a broadcaster has no existing rights to mandatory cable carriage of EPG data in the VBI that is unrelated to the video content in the broadcast signal because the Communications Act expressly grants cable operators the *discretion* to carry such “nonprogram-related material.” *See* 47 U.S.C. § 534(b)(3); *see also Digital Must-Carry Order*, CS Docket No. 98-120, FCC 01-22, at ¶ 64 (rel. Jan. 23, 2001) (finding that “program guide data that are not specifically linked to the video content of the digital signal being shown cannot be considered program-related”). Surely, Congress could not have intended that a cable operator’s exercise of

(footnote continued...)

Commenters advocating regulation rely on pure speculation, unsupported by any examples of past or present anticompetitive conduct on the part of cable operators or even economic evidence explaining why regulation would be necessary in the absence of such conduct. For example, Consumers Union proposes that the Commission adopt “prophylactic” regulations and argues that “early adoption of nondiscrimination principles prevents the need for painful and all-encompassing regulation later.”⁴² Such arguments have no merit.

First, it is folly for Consumers Union and other advocates of ITV regulation to suggest that they can predict how the ITV market will develop. Neither Consumers Union, nor any other party, can determine whether regulation ever will be necessary. Second, contrary to Consumers Union’s suggestion, nondiscrimination “principles” are not without cost. Rather, they are inherently vague, particularly when it comes to defining what constitutes “discrimination,” and always require further government regulation, including rulemakings to determine rules of conduct and administrative proceedings to enforce those rules. Third, Consumers Union vastly overstates the necessity for prophylactic regulation. As Chairman Powell recently said:

The paradox is: if it’s easy for them to [engage in anticompetitive conduct], you’re also exaggerating how hard it is to undo it. I’ve talked to a lot of antitrust scholars who . . . almost to the one, pooh-pooh this idea: that, oh, if we didn’t do this now, an ounce-of-prevention-now kind of thing, that we could never untangle it later. The phone situation, which we did untangle and continue to untangle, is an order of magnitude more complicated than a lot of these markets are to

(...footnote continued)

this express statutory grant of discretion be construed by the Commission as anticompetitive conduct.

⁴² Comments of Consumers Union at 4-7.

untangle, in my opinion.⁴³

Commenters advocating regulation also make broad assertions about the incentives of cable operators to discriminate in order to protect affiliated ITV services. However, the only economic evidence submitted in the comments demonstrates that cable operators have an incentive to provide subscribers with as great a variety of content as possible.⁴⁴ Ironically, the very same commenters now advocating ITV regulation have previously lobbied the Commission to refrain from imposing similar nondiscrimination requirements on their industry. For example, in a proceeding involving the transmission of interactive data (including ITV data) in broadcasters' VBI and video streams, NAB urged the Commission to refrain from imposing a nondiscrimination requirement on broadcasters.⁴⁵

⁴³ See *BNA Interview*, *supra* note 38, at 6. See also *The e-biz* 25, BusinessWeek Online, May 14, 2001 (quoting Chairman Powell as saying: "[Deregulation] is not a reward for competition, it's an incentive for competition"), http://www.businessweek.com/magazine/content/01_20/b3732643.htm.

⁴⁴ See Schwartz/Gale Analysis at 2-3 ("One cannot presume that even an input monopolist would necessarily have strong incentives to significantly disfavor rivals of its downstream affiliate: those retail-market rivals are also its customers for access services, so handicapping them entails a loss of profitable access sales."); Elhauge Analysis at 23, 29, 31-32 (noting that ITV services complement an ITV platform and, thus, even if a cable operator was a monopolist, the "ready availability of any complementary goods customers desire [*i.e.*, ITV services] increases the value of the monopolist's asset [*i.e.*, the cable system]").

⁴⁵ Comments of NAB, filed in MM Docket No. 95-42, at 4 (June 23, 1995) ("As long as a broadcaster is considered responsible for the content of ancillary or subsidiary communication services sent over the station's facilities, it is imperative that the licensees have the ability to delete the data being transmitted. We believe that the Commission should require that any acceptable data insertion method provide the option to block or strip out the data."). The Commission agreed with the NAB, so broadcasters now have absolute control over the interactive data they transmit. See 47 C.F.R. § 73.646(d) (authorizing broadcast licensees "to lease their VBI and visual signal" but requiring them to "retain control over all material
(footnote continued...)

Moreover, other advocates of ITV regulation are companies with significant market power that are fully capable of obtaining cable carriage of their content without the need for government intervention. For example, Disney and Viacom have been remarkably adept at using their programming assets to leverage carriage of a wide variety of content by cable operators. Last year, in order to settle a retransmission dispute, Disney forced Time Warner to: convert the Disney Channel from a premium to an expanded basic service; significantly expand its current carriage of ESPN, ESPN2, ESPN Classic, and ESPN News; and carry new services, SoapNet and Toon Disney.⁴⁶ At the same time, ESPN was notifying cable operators that “it would expand its lead as the most expensive national basic cable network and boost its license fees to operators by 20 percent.”⁴⁷

Similarly, in discussing Viacom’s market power, Viacom President Mel Karmazin has opined: “We have an awful lot now of retransmission to be able to take to Viacom and have Viacom use CBS retransmission content to get additional carriage for its properties. . . . The idea is that you should believe it is very good to be a broadcaster with cable [programming] assets.”⁴⁸ Lately, Viacom has begun to use its market power in cable programming to force cable operators

(...footnote continued)

transmitted in a broadcast mode via the station’s facilities, with the right to reject any material that it deems inappropriate or undesirable”).

⁴⁶ See Bruce Orwell & Joe Flint, *Disney, Time Warner Sign Deal*, Wall St. J., May 26, 2000, at B6.

⁴⁷ Steve McClellan & John Higgins, *Disney Triumphant*, Broad. & Cable, May 8, 2000, at 8. ESPN has raised its rates by another 20% this year. See Steve Donohue and Thomas Umstead, *ESPN 20% Fee Hike: Maximum Headache*, Multichannel News, May 7, 2001.

⁴⁸ Mike Farrell & Linda Moss, *Karmazin to Play Retrans Chip for MTVN Cable Networks*, Multichannel News, May 22, 2000, at 1, 66.

to carry its Country Music Television channel or face significant increases in the price for the popular TNN service, which reaches over 80 million viewers.⁴⁹

It is difficult to understand how these companies -- with their substantial market power in numerous media markets and a well-documented history of forcing cable operators to carry all manner of content -- are suddenly powerless and in need of government protection when it comes to ITV.⁵⁰

B. Marketplace Evidence Refutes NAB's Argument that Regulation Is Needed to Prevent Cable Operators from Discriminating By Means of EPGs.

NAB asserts that "[t]hrough their control of the linkages between interactive data and the other elements of a television program, cable operators will be able to manipulate the EPG to discriminate against whatever interactive services and content they wish."⁵¹ NAB's argument is dependent on the theory that cable operators will either use affiliated EPG providers to discriminate against unaffiliated content, or convince unaffiliated EPG providers to relinquish control of the EPG to the cable operator for that purpose.

⁴⁹ See Linda Moss, *Viacom Leverages TNN to Ire of Small Ops*, TelecomClick, Apr. 13, 2001 (reporting that "Viacom's cable unit, MTV Networks, is floating a new rate card that bundles TNN, formerly The Nashville Network, and CMT together" and that "if a cable system doesn't opt to launch CMT, its monthly license fee for TNN will jump substantially, to as much as 50 cents"), at <http://www.telecomclick.com/newsarticle.asp?Newsarticleid=194514&mode=print>.

⁵⁰ See Robert Sachs, President and CEO, NCTA, *A Winning Combination*, Remarks to the Society of Cable Telecommunications Engineers (May 9, 2001) ("[Disney and Viacom] are not strangers to free enterprise. Therefore, one might ask, why do they think the laws of the marketplace can be suspended for Interactive TV? And, do they think cable operators are going to invest hundreds of millions of dollars in Interactive TV if there are pre-existing limits on how ITV services are permitted to develop?").

⁵¹ Comments of NAB at 26.

With respect to using affiliated EPG providers, marketplace evidence shows that the majority of cable operators have signed agreements with *unaffiliated* EPG providers. For example, Comcast, Charter, and other MSOs have signed long term licensing agreements with Gemstar-TV Guide to offer TV Guide Interactive to the majority of their subscribers.⁵² AT&T also has a licensing agreement with Gemstar-TV Guide, which will be an unaffiliated service when AT&T accomplishes the spin-off of Liberty Media later this year.⁵³ Similarly, Time Warner recently signed a five year deal with Tribune Media Services to license the Zap2it EPG.⁵⁴

In these and other cases where cable operators do not own EPG providers, in order to “manipulate the EPG to discriminate against whatever interactive services and content they wish,” operators would need to convince these unaffiliated EPG providers to relinquish control of the EPG. NAB has submitted no evidence showing that any such efforts are underway or that unaffiliated EPG providers have any incentive to relinquish control of their proprietary EPGs.

⁵² Press Release, Gemstar-TV Guide, *Gemstar-TV Guide International and Comcast Cable Announce a 20-Year IPG Agreement* (Mar. 23, 2001), <http://www.tvguideinc.com/press/pr032301.asp>; Press Release, Gemstar-TV Guide, *Gemstar-TV Guide and Charter Communications Announce Long-Term Interactive Program Guide Agreement* (Feb. 16, 2001) (“*Gemstar-Charter Press Release*”), <http://www.tvguideinc.com/press/pr021601.asp> (noting that “TV Guide Interactive services are carried in systems owned by all the top 10 MSO’s which include Adelphia, AT&T, AOL Time Warner, Cablevision, Charter, Comcast, Cox, and Insight, and DBS leader DirecTV”).

⁵³ See Press Release, AT&T Corp., *AT&T Receives Tax-Free Ruling from the IRS for Future Split Off of Liberty Media* (Apr. 11, 2001).

⁵⁴ See Steve Donohue, *Time Warner Orders Tribune’s Guide*, *Multichannel News*, Apr. 2, 2001, at 3.

Indeed, unaffiliated EPG providers have a significant interest in ensuring that their product is not misused.

III. THE FIRST AMENDMENT PROHIBITS, AND THE COMMUNICATIONS ACT PROVIDES NO JURISDICTION FOR, REGULATION OF ITV.

A. In the Absence of Evidence of Anticompetitive Conduct by Cable Operators in the ITV Business, the Commission Lacks a Substantial Government Interest for Regulating Cable Operators' Editorial Discretion.

Under the First Amendment, the Commission may impose content-neutral regulations on cable operators only where such regulation “advances important government interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”⁵⁵ The Supreme Court has held that the Commission can impose regulations that single out cable operators for special obligations relative to content *only* where such regulations are based on *substantial record evidence* of anticompetitive behavior.⁵⁶ Just recently, the U.S. Court of Appeals for the D.C. Circuit noted that “*Turner I* demands that the FCC do more than ‘simply posit the existence of the disease sought to be cured,’” but rather “requires that the FCC draw ‘reasonable inferences based on substantial evidence.’”⁵⁷ The *Time Warner* court rejected the Commission’s horizontal ownership limits for this very reason,

⁵⁵ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)) (“*Turner II*”).

⁵⁶ *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994). Absent a non-conjectural risk of anti-competitive behavior, the Commission lacks an “important governmental interest[] unrelated to the suppression of free speech.” *Turner II*, 520 U.S. at 189.

⁵⁷ *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1132-33 (D.C. Cir. 2001) (citations omitted) (“*Time Warner*”).

concluding that “the Commission has pointed to nothing in the record supporting a non-conjectural risk of anti-competitive behavior, either by collusion or other means.”⁵⁸

As noted, advocates of ITV regulation rely solely on their own theorizing about potential anticompetitive cable operator behavior to “support” their draconian regulatory proposals. These advocates do not cite a single instance -- let alone *substantial evidence* -- of real-world anticompetitive conduct. Absent such substantial evidence, it is impossible for the Commission to make any “reasonable inferences” of anticompetitive conduct by cable operators. The recent *Time Warner* decision makes plain that imposing regulations under such circumstances violates the First Amendment rights of cable operators.

B. The Commission Lacks Authority under the Communications Act to Impose the Nondiscrimination Conditions Discussed in the *Notice*.

Commenters suggest a variety of jurisdictional bases on which the Commission can allegedly regulate ITV. Consumers Union, for example, states that ITV is an information service over which the Commission has ancillary jurisdiction, or a telecommunications service subject to nondiscrimination requirements, regardless of whether it is a common carrier service.⁵⁹ In contrast, various broadcast commenters contend that ITV is a cable service over which the Commission can impose broad nondiscrimination requirements.⁶⁰ EarthLink, however, argues that ITV services are comprised of several components, each subject to regulation under different

⁵⁸ *Id.* at 1136.

⁵⁹ See Comments of Consumers Union at 8-10.

⁶⁰ See Comments of Disney/Viacom *et al.* at 22-23; Comments of NAB at 12-15.

Titles of the Act.⁶¹ Finally, the local phone companies conclude that the ITV broadband platform is telecommunications subject to Title II-like nondiscrimination requirements, or, alternatively, that ITV services are merely a subset of Internet access and, therefore, are information services that can be regulated under Title I.⁶²

If anything, these alleged legal bases demonstrate one thing: there is no clear understanding of what ITV service is or what potential ITV services consumers will adopt. Thus, any attempt by the Commission to define ITV, or to impose a legal classification, at this point would be premature.⁶³

To the extent the Commission insists on defining or classifying ITV services, it should conclude that ITV is a cable service -- when provided by a cable system operator -- or an information service, but not a telecommunications service.⁶⁴ The Commission is, therefore, prohibited under the Communications Act from imposing nondiscriminatory access, or other common carrier-like regulations, on cable operators' ITV service offerings.

Because ITV services are cable services, the Commission is prohibited from subjecting them to common carriage requirements under Title II of the Communications Act (for example,

⁶¹ See Comments of EarthLink at 8-14.

⁶² See Comments of SBC/BellSouth at 2, 4 (also asserting that the Commission has authority to regulate ITV service providers that self-provide the transmission component of their service offerings as Title II common carriers).

⁶³ See *AOL-Time Warner Merger Order*, CS Dkt. No. 00-30, FCC 01-12 (released Jan. 22, 2001) (Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part at 11) ("Without a clear product, [the Commission] cannot define a product market, nor can [the Commission] assess the competitiveness of that market.").

⁶⁴ See Comments of AT&T at 34-39.

by imposing broad nondiscrimination requirements).⁶⁵ Moreover, with respect to regulating cable services under Title VI of the Communications Act, the Commission is prohibited from “impos[ing] requirements regarding the provision or content of cable services, *except as expressly provided in this title* [(i.e., Title VI)].”⁶⁶ To the extent advocates of regulation rely on provisions in Title VI -- such as sections 613 (ownership), 616 (program carriage), 628 (program access), and 653 (open video systems) -- as a jurisdictional basis to adopt their proposed ITV regulations,⁶⁷ they are simply wrong. None of these provisions, either alone or in combination, authorize the Commission to impose on cable operators the common carrier-type or otherwise expansive and onerous nondiscrimination ITV regulations advocated by these commenters. Indeed, any interpretation that these sections did permit regulation would be squarely at odds with section 621(c) of the Act which *prohibits* such regulations. Finally, because ITV services

⁶⁵ See 47 U.S.C. § 541(c) (“Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”).

⁶⁶ *Id.* § 544(f)(1). See also Notice at 21 (Statement of Commissioner Furchtgott-Roth, dissenting) (citing section 624(f)(1) and concluding that “[a]s the Act is void of an express statutory provision regarding ITV services over cable systems, it is arguable that the Commission is prohibited from commencing a rulemaking proceeding on the subject”).

⁶⁷ See Comments of Disney/Viacom *et al.* at 26 (advocating that the Commission “invoke provisions such as section 613 on ownership restrictions, section 616 on carriage agreements, and section 653 on Open Video Systems to create a framework” for nondiscrimination rules); Comments of ALTV at 17-18 (urging the Commission to broadly expand its section 616 rules to include a rebuttable presumption of discriminatory intent and accelerated deadlines for Commission action on carriage complaints); Comments of NAB at 14 (advocating that the Commission use sections 616 and 628 as “the general regulatory template for nondiscrimination provisions applicable to ITV services”).

are also information services, the Commission may not subject cable operators providing such services to common carrier regulation under Title II.⁶⁸

IV. CONCERNS ABOUT THE SET-TOP BOX AS A POTENTIAL BOTTLENECK TO THE DELIVERY OF ITV SERVICES ARE UNJUSTIFIED.

Several commenters raise concerns about the Commission's implementation of the retail sale rules,⁶⁹ or highlight their fears that cable operators "will have the ability" to discriminate against their ITV services using set-top boxes.⁷⁰ These comments are without merit and should be rejected.

As an initial matter, CERC and MSTV raised exactly the same issues in the Commission's pending retail sale proceeding,⁷¹ and their comments need not be considered again here. AT&T, NCTA, Motorola, and others have responded in detail to these various proposals in their comments and reply comments in that proceeding, and AT&T incorporates these comments by reference here.⁷²

⁶⁸ See Comments of AT&T at 38.

⁶⁹ See Comments of MSTV at 7-8; Comments of Canal+ Technologies at 24; Comments of CERC *passim*; *c.f.* Comments of EarthLink at 16.

⁷⁰ Comments of Disney/Viacom *et al.* at 6.

⁷¹ See MSTV Reply Comments, filed in CS Dkt. No. 97-80 (Dec. 18, 2000); CERC Comments, filed in CS Dkt. No. 97-80 (Nov. 15, 2000); CERC Reply Comments, filed in CS Dkt. No. 97-80 (Dec. 18, 2000).

⁷² See, *e.g.*, AT&T Reply Comments, filed in CS Dkt. No. 97-80, at 14-17 (Dec. 18, 2000) ("AT&T Retail Sale Reply Comments") (critiquing CERC's proposals to impose new standard-setting and disclosure obligations on the cable industry); Motorola Reply Comments, filed in CS Dkt. No. 97-80, at 10-18 (Dec. 18, 2000) ("Motorola Retail Sale Reply Comments") (responding to proposals for mandated standardization); NCTA Reply Comments, filed in CS Dkt. No. 97-80, at 32-35 (Dec. 18, 2000) ("NCTA Retail Sale Reply Comments") (responding to CERC
(footnote continued...))

Moreover, the Commission's retail sale rules⁷³ ensure that competing ITV providers are able to manufacture and market their own ITV-capable digital set-top boxes that will operate with cable systems, thereby bypassing the cable operator's own set-top boxes and removing altogether any alleged ability to discriminate against unaffiliated ITV providers.⁷⁴ Indeed, several ITV providers have offered their interactive services through stand-alone consumer devices that are designed to work in conjunction with a subscriber's television set and chosen source for video programming. For example, WebTV, with over a million subscribers, has deployed ITV services utilizing a stand-alone set-top box.⁷⁵ Similarly, AOLTV released its stand-alone set-top box that integrates PVR functions (provided by TiVo), web access, e-mail, and e-commerce capabilities.⁷⁶ On its own, TiVo has sold at least 154,000 stand-alone boxes that provide PVR functions (recording, pausing, etc.) as well as an interactive program guide, viewer polling technology, and subscriber profiling features.⁷⁷

(...footnote continued)

arguments on equipment averaging); Time Warner Reply Comments, filed in CS Dkt. No. 97-80, at 4-5 (Dec. 18, 2000) (responding to concerns with PHI license agreement).

⁷³ See 47 C.F.R. §§ 76.1200-1210.

⁷⁴ See Comments of AOL Time Warner at 15-16. In fact, the Commission noted in its *AT&T-MediaOne Merger Order* that the retail sale rules "limit MVPDs' ability to exercise excessive market power and dominate the equipment market" and "alleviate concerns regarding competition in the production and sale of set-top boxes." See *AT&T-MediaOne Merger Order*, 15 FCC Rcd. 9816 at ¶¶ 97, 100 (2000).

⁷⁵ See Ian Fried, *Microsoft Shifts WebTV Oversight To Redmond*, CNET News.com, Mar. 2, 2001, at <http://news.cnet.com/news/0-1006-200-4997557.html>.

⁷⁶ See Kishore, *supra* note 13, at 4.

⁷⁷ See *id.* at 2-3.

In addition, as AT&T, NCTA, and others have noted previously in the retail sale proceeding, CableLabs has developed specifications that establish the functional requirements for a digital television receiver to operate on a bi-directional cable plant and access interactive services using the direct connection.⁷⁸ Furthermore, CableLabs is developing the OpenCable Application Platform (“OCAP”) -- or middleware -- software specification, which includes a set of application programming interfaces designed to establish a road map for companies to create applications for services that operate seamlessly over the broadband cable network. By adding software interfaces to the existing OpenCable hardware platform, OCAP will provide consumer electronics manufacturers and retailers even greater ability to build set-top boxes or integrated television receivers capable of providing the same services available on set-tops provided by the cable operator.⁷⁹

For these reasons, concerns over cable operators utilizing set-top boxes to discriminate against unaffiliated ITV service providers are misplaced. The Commission should reject

⁷⁸ See, e.g., AT&T Retail Sale Reply Comments at 9-10; NCTA Retail Sale Reply Comments at 5-7. Moreover, nothing in the OpenCable specifications bars a manufacturer from licensing the necessary technology to include EPG, VOD, and other interactive features in the set-top devices they are building for the retail market. See Motorola Retail Sale Reply Comments at 8. Because the OpenCable specifications allow for such interactive functionality in the POD-host combination, Canal+ Technologies’ concerns about the POD module are misplaced.

⁷⁹ See AT&T Retail Sale Reply Comments at 9-10; NCTA Retail Sale Reply Comments at 7. See also *Ex Parte* Letter from William Check, NCTA, to Magalie R. Salas, FCC, filed in PP Dkt. No. 00-67, at 1-2 (Apr. 30, 2001) (also noting that OCAP will support the portability of navigation devices).

commenters' invitations to address this issue in this proceeding, particularly because it has been, and continues to be, addressed in the retail sale proceeding.⁸⁰

⁸⁰ AT&T also notes that EarthLink's proposal to impose CPE unbundling requirements on ITV set-top boxes must be rejected on both legal and policy grounds. First, EarthLink confuses "telecommunications" with "telecommunications service." Although, as AT&T has noted previously, cable operators may provide certain information services via telecommunications' facilities, none of the ITV services mentioned in the *Notice* are "telecommunications services." See Comments of AT&T at 36-37. Second, EarthLink's proposed unbundling requirement conflicts with recent Commission efforts to *eliminate* such rules in the telco context. See *Review of Customer Premises Equipment and Enhanced Services Unbundling Rules*, Rept. & Order, CC Dkt. Nos. 96-61, 98-183, FCC 01-98 (rel. Mar. 30, 2001). In light of these developments, the Commission cannot and should not impose such requirements in the nascent ITV space.

V. CONCLUSION

For the foregoing reasons, AT&T respectfully urges the Commission to close this proceeding without proposing any ITV regulations.

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